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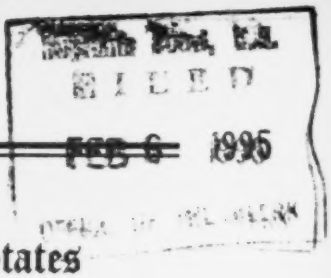

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NOVATEL COMPUTER SYSTEMS, INC.,
Petitioner,

v.

CRAY COMMUNICATIONS, INC.,
FORMERLY KNOWN AS
DOWTY COMMUNICATIONS, INCORPORATED,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

BRIEF IN OPPOSITION.

ERIC A. DEUTSCH*
ROGER A. LANE
THOMAS A. BOCKHORST
TESTA, HURWITZ & THIBEAULT
53 State Street
Boston, Massachusetts 02109
(617) 248-7000

THOMAS M. GOSS
GOODELL, DEVRIES, LEECH
& GRAY
One South Street
Baltimore, Maryland 21202
(410) 783-4000

**Counsel of Record*

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

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Questions Presented

1. Whether the Fourth Circuit properly applied *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), by affirming the District Court's grant of summary judgment to a moving party who, after extensive discovery:

   a) articulated the elements of the nonmovant's fraud claim and the burden of proof required of the nonmovant; and

   b) pointed out the absence of any evidence in the record supporting the nonmovant's claim.

2. Whether the Fourth Circuit properly found that the trial court did not abuse its discretion when it:

   a) granted a moving party summary judgment on a nonmoving party's fraud claim without first holding a hearing, when the nonmovant failed to submit any evidence in opposition to the motion and failed to request a hearing, and the local rules of the federal district court provided that a court could grant summary judgment without a hearing, even if a hearing was requested; and

   b) denied, after entry of its order of summary judgment, the nonmovant's motion for reconsideration, or in the alternative, for permission to supplement the record with an untimely affidavit.

Table of Contents

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE STANDARD FOR SUMMARY JUDGMENT IS WELL-SETTLED AND THERE IS NO NEED FOR THIS COURT TO REOPEN AN ISSUE IT ALREADY HAS ADDRESSED AND CLEARLY RESOLVED 6

A. Petitioner Urges a Standard that this Court Squarely Rejected in *Celotex*. 6

B. Lower Courts Consistently Have Applied *Celotex* as the Fourth Circuit Did in this Case. 10

II. THIS CASE IS NOT APPROPRIATE FOR REVIEW BECAUSE RESPONDENT AMPLY SUPPORTED ITS MOTION FOR SUMMARY JUDGMENT 12

III. BECAUSE THE FOURTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S EXERCISE OF DISCRETION IN ACCORD WITH WELL-SETTLED LAW, THERE IS NO NEED FOR THIS COURT TO REVIEW THE DECISION 15

A. The District Court Did Not Abuse Its Discretion in Granting Summary Judgment to Respondent Without an Oral Hearing 15

B. The District Court Did Not Abuse Its Discretion in Denying Petitioner's Motion to Supplement the Record with an Untimely Affidavit 16

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 6,8
Allen v. Minnstar, Inc.,
8 F.3d 1470 (10th Cir. 1993) 11
Baptiste v. Commissioner of Internal Revenue,
29 F.3d 1533 (11th Cir. 1994) 11
Celotex Corp. v. Catrett,
477 U.S. 317 (1986) i,5,6,7,8,10,13,14
Cray Communications, Inc. v. Novatel Computer Sys.,
33 F.3d 390 (4th Cir. 1994) 2,7,10
Dowty Communications, Inc. v. Novatel Computer Sys.,
817 F.Supp. 581, (D. Mass. 1992) 14
Geear v. Boulder Community Hosp.,
844 F.2d 764 (10th Cir.) *cert. denied*, 488 U.S. 927 (1988).... 16
Lake at Las Vegas Investors v. Pacific Malibu Dev.,
933 F.2d 724 (9th Cir. 1991) *cert. denied*,112 S. Ct. 1295
(1992)..... 15
Lewis v. Gillette, Co.,
22 F.3d 22 (1st Cir. 1994)..... 11
Lujan v. National Wildlife Federation,
497 U.S. 871 (1990) 9,16
Missouri Pacific R.R. Co. v. Harbison-Fischer Mfg.,
26 F.3d 531 (5th Cir. 1994) 10,11
Professional Programs Group v. Department of Commerce,
29 F.3d 1349 (9th Cir. 1994) 11,12

Sakaria v. Trans World Airlines,
8 F.3d 164 (4th Cir. 1993) 15
Walker v. Shansky,
28 F.3d 666 (7th Cir. 1994) 11
Willis v. Roche Biomedical Laboratories,
21 F.3d 1368 (5th Cir. 1994) 10

OTHER AUTHORITY

10A Charles A. Wright *et al.*, *Federal Practice and Procedure*
§2720 (Supp. 1994) 9

No. 94-1184

In the
Supreme Court of the United States

October Term, 1994

NOVATEL COMPUTER SYSTEMS, INC.,

Petitioner,

v.

CRAY COMMUNICATIONS, INC.,
formerly known as
DOWTY COMMUNICATIONS, INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

Respondent Cray Communications, Inc.[1], formerly known as Dowty Communications, Inc. ("Dowty"), hereby opposes the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit affirming the grant of summary judgment to Dowty on Novatel's counterclaim for fraud.

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 33 F.3d 390 (4th Cir. 1994). The opinion of the District Court for the District of Maryland granting Dowty's motion and denying Novatel's motion for reconsideration is reported at 817 F. Supp. 581 (D. Md. 1992).

Statement of the Case

During 1990, Dowty and Novatel discussed the possibility of Novatel distributing Dowty communications equipment. The parties reached an agreement pursuant to which Novatel became a nonexclusive distributor of Dowty products. In the agreement, Dowty warranted that its products and repair work would be free from defects in material and workmanship for a specified period. The parties agreed that Dowty made no other warranties. They also agreed to limit Dowty's liability under the agreement. *See Cray Communications, Inc. v. Novatel Computer Sys.*, 33 F.3d 390, 391 (4th Cir. 1994).

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[1] Cray Communications, Inc. is a subsidiary of Case Communications, USA, which is a subsidiary of B&T Holdings, Inc., which in turn is a subsidiary of Cray Electronics Holdings, PLC. Cray Communications, Inc. is not the parent company of any subsidiary company.

Pursuant to the agreement, Dowty shipped equipment to Novatel, submitted invoices to Novatel, and repeatedly demanded payment from Novatel, but Novatel refused to pay. Novatel claimed that Dowty shipped the units late and that those that were shipped did not function as allegedly promised. Dowty denied these claims. Novatel contended that due to these alleged delays and defects, it did not have to pay Dowty. Id.

Dowty then filed this action for breach of contract, seeking to recover the money Novatel owed it. Novatel responded with a counterclaim alleging fraud by Dowty and seeking $2 million in compensatory damages and $3 million in punitive damages.[2]

After the parties engaged in extensive discovery, Dowty moved for summary judgment on Novatel's counterclaims, including its fraud claim. With its motion, Dowty filed a supporting memorandum and an affidavit with exhibits.[3]

In opposing Dowty's summary judgment motion, Novatel did not submit with its memorandum any affidavits, deposition testimony, answers to interrogatories, or authenticated documents to show a genuine issue of material fact, nor did it request a hearing.[4] The only document Novatel submitted was

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[2] Novatel filed other counterclaims that are not at issue in Novatel's Petition. (Pet. at 4 & n.2.)

[3] Contrary to Novatel's claims, Dowty's memorandum in support of its summary judgment motion contained a statement of undisputed facts and specifically referred to the complaint and counterclaims, the deposition of Novatel's President, and a number of documents produced through discovery.

[4] The language Novatel quotes from its memorandum in opposition (Pet. at 7) did not constitute a request for hearing but merely indicated Novatel's apparent assumption that the court would hold a hearing, notwithstanding Local Rule 105.6 of the District Court of Maryland, pursuant to which a court may decide a summary judgment motion without oral argument.

an unauthenticated and unexplained Novatel "DCP9500 Systems Failure Analysis," dated "8-13-91 thru 6-2-92" and apparently generated during the pendency of the case.

Dowty submitted a reply memorandum and accompanying affidavit with exhibits. Novatel did not submit any further briefing or evidence in opposition to Dowty's motion, nor did it seek leave to do so.

On October 16, 1992, the District Court granted Dowty's partial summary judgment motion. Novatel subsequently moved for reconsideration or, in the alternative, to supplement the record with an affidavit of Daniel D. Pearlson, Novatel's President. The District Court denied Novatel's motion.

The United States Court of Appeals for the Fourth Circuit affirmed the District Court's grant of summary judgment to Dowty and the denial of Novatel's motion for reconsideration.

* * *

Summary of Argument

This is not an appropriate case for grant of a writ of certiorari. Novatel's petition stems from a dispute that was resolved through summary judgment after Novatel, the party bearing the burden of proof, failed to produce any evidence to demonstrate a genuine issue of material fact. This Court should not entertain Novatel's effort to avoid the consequences of this failure because this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-27 (1986) already expressly rejected the argument Novatel now makes. As Novatel admits, "*Celotex* clearly states that the moving party need not negate all aspects of the plaintiff's claim," (Pet. at 15), and "[t]he burden on the nonmoving party in a summary judgment situation is well settled." (Pet. at 15.) There is no split in the circuits regarding the application of *Celotex*.

Further, contrary to Novatel's assertion, Dowty, as a summary judgment movant, made a proper initial showing as contemplated by *Celotex*. Dowty identified the specific elements of Novatel's claims, articulated Novatel's required burden of proof, and clearly pointed out that, despite extensive discovery, there was no evidence in the record from which Novatel could establish a genuine issue of material fact. The trial court properly granted Dowty summary judgment based on Novatel's complete failure to produce any evidence showing a genuine issue of material fact.

Finally, the district court did not abuse its discretion in deciding Dowty's motion for summary judgment without oral argument where there was no record evidence in opposition to the motion, or in denying Novatel's motion to submit an untimely affidavit.

Argument

I. THE STANDARD FOR SUMMARY JUDGMENT IS WELL-SETTLED AND THERE IS NO NEED FOR THIS COURT TO REOPEN AN ISSUE IT ALREADY HAS ADDRESSED AND CLEARLY RESOLVED

Novatel argues that in moving for summary judgment on Novatel's fraud counterclaim, Dowty had to "negate any factual matters that [were] within its realm of knowledge." (Pet. at 15.) Yet this Court in *Celotex* clearly stated that there is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Celotex*, 477 U.S. at 323. While Novatel asserts that it seeks clarification of *Celotex*, it in fact urges this Court to reopen *Celotex* and adopt an interpretation of *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970), that the *Celotex* Court expressly rejected. *See Celotex*, 477 U.S. at 321-22, 325-26. As demonstrated herein, Novatel's argument regarding the proper interpretation of *Celotex* is fundamentally misguided. Further, lower courts have consistently applied *Celotex* in the same manner as the Fourth Circuit did in this case.

A. Petitioner Urges a Standard that this Court Squarely Rejected in Celotex.

Novatel admits that "*Celotex* clearly states that the moving party need not negate all aspects of the plaintiff's claim." (Pet. at 15.) Thus Novatel's argument that Dowty had to submit evidence to negate *Novatel's* claim, and that Dowty's motion was therefore insufficient, is puzzling in how it fundamentally misconceives a summary judgment movant's obligation when the nonmovant bears the burden of proof. In *Celotex*, this Court

made clear that a party who does not have the burden of proof at trial may move for summary judgment *without* any supporting affidavits or other materials negating the adversary's claim, and in so moving cast upon the nonmovant the burden of producing evidence sufficient to establish its *prima facie* case. *Celotex*, 477 U.S. at 323. This Court pointedly reiterated the language in Fed. R. Civ. P. 56(a) and (b) that a party may move for summary judgment "*with or without supporting affidavits*," and specifically rejected the ruling of the Court of Appeals in that case -- and Novatel's argument here -- in holding that there is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.*

In *Celotex*, the Court of Appeals had improperly relied on *Adickes* in concluding that "'the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact.'" *Id.* at 322 (quoting *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184 (D.C. Cir. 1985)). Novatel advances this same argument now, as it did in the lower courts. (Pet. at 15.) Yet it was precisely this Circuit Court decision, and this interpretation of *Adickes*, that this Court reversed in *Celotex*.[5] As the *Celotex* Court stated, "We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure." *Celotex*, 477 U.S. at 322. The Court reasoned that "unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support

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[5] As the Fourth Circuit noted in this case, "Novatel has gotten the holding of *Celotex* precisely backwards." *Cray Communications v. Novatel Computer Sys.*, 33 F.3d 390, 393 (4th Cir. 1994).

its motion with affidavits or other similar materials *negating* the opponent's claim," *Id.* at 323. Most significantly, the Court concluded that it "[did] not think that the *Adickes* language [regarding the 'burden of the moving party'] should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof." *Id.* at 325.[6]

The *Celotex* Court supported its decision by referencing the inherent power of district courts to enter summary judgments *sua sponte*:

> Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence. It would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion

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[6] In addition, Justice White in his concurring opinion in *Celotex* stated: "I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about material fact." *Celotex*, 477 U.S. at 328. Novatel purports to rely on Justice White's opinion, quoting the continuation of this language, but it disingenuously omits this critical first sentence. (Pet. at 13.) Justice White's concern was with summary judgment motions that are not supported "in any way" or consist only of a "conclusory assertion." *See Celotex*, 477 U.S. at 328. As discussed in Section II, *infra*, Dowty's fifty pages of briefing and accompanying evidence can scarcely be characterized in that manner.

> requesting such a disposition precluded the District Court from ordering it.

Id. at 326 (citations omitted).[7]

The Court reiterated its *Celotex* holding in *Lujan v. National Wildlife Federation*, stating that:

> *Celotex* made clear that Rule 56 does not require the moving party to *negate* the elements of the nonmoving party's case; to the contrary, "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied."

497 U.S. 871, 884-85 (1990) (quoting *Celotex*, 477 U.S. at 322-23).

In short, Novatel advances a standard, based on a misinterpretation of *Adickes*, that this Court thoroughly rejected in *Celotex*. Contrary to Novatel's assertions, Dowty was not required to submit evidence that negated the allegations of Novatel's counterclaim in moving for summary judgment. Rather, as the Fourth Circuit properly held in affirming the denial

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[7] *See also* 10A Charles A. Wright *et al.*, *Federal Practice and Procedure* §2720 (Supp. 1994) (recognizing that this reasoning suggests that "the moving party on a summary judgment motion need not produce evidence, but simply can argue that there is an absence of evidence by which the nonmovant can prove his case.")

of Novatel's motion for reconsideration, "'the burden on the moving party might be discharged by "showing" -- that is, *pointing out* to the District Court -- that there is an absence of evidence to support the nonmoving party's case.'" *Cray Communications v. Novatel Computer Sys.*, 33 F.3d 390, 394 (4th Cir. 1994) (quoting *Celotex*, 477 U.S. at 325) (emphasis added).[8] Novatel's argument that the District Court somehow misinterpreted or misapplied *Celotex* in not requiring Dowty to produce evidence negating Novatel's counterclaim (and that this excused Novatel from producing any contrary evidence) is misguided and not worthy of further review.

B. Lower Courts Consistently Have Applied *Celotex* as the Fourth Circuit Did in this Case.

Novatel misleadingly states that "most circuits" follow the rule it proposes. (Pet. at 9-10.) Yet the *only* decision Novatel cites in support of its assertion does not articulate or even implicitly apply the standard Novatel advances. *See Missouri Pacific R.R. Co. v. Harbison-Fischer Mfg.*, 26 F.3d 531, 539 (5th Cir. 1994)[9] In *Missouri Pacific*, the Fifth Circuit reversed a district court's grant of summary judgment to a defendant on a plaintiff's federal law claim, not because the movant failed to negate the nonmovant's case, or even because it failed to support

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[8] Novatel criticizes as "tortuous" the District Court's reasoning that a summary judgment movant need only "point out" that the nonmovant has no evidence to support its claim. (Pet. at 9.) Yet the District Court's holding was simply a straightforward application of *Celotex*. *See Celotex*, 477 U.S. at 325.

[9] Significantly, Novatel's citation of *Willis v. Roche Biomedical Laboratories*, 21 F.3d 1368, 1371 (5th Cir. 1994), as an example of decisions that cannot be reconciled with Novatel's proffered interpretation of *Adickes* and *Celotex*, (Pet. at 13-14), undermines its contention that the Fifth Circuit's standard supports its position.

its motion with evidence from the record, but simply because the movant had not *sought* summary judgment on the plaintiff's federal law claim. The movant had not articulated the elements of the claim and had stated in its motion that it sought summary judgment as to the plaintiff's "State Law Claims," while not referring to the federal law claim, other than to state generally that it sought "a full summary judgment." *Id.* at 538-39.[10]

Novatel properly concedes that other circuits apply *Celotex* in a manner similar to the Fourth Circuit's application in this case. (Pet. at 10) (quoting *Walker v. Shansky*, 28 F.3d 666, 670-71 (7th Cir. 1994)). *See also Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1481 (10th Cir. 1993)(holding that summary judgment movant who indicated the absence of evidence met initial burden).[11]

Novatel also has failed to cite any authority suggesting that lower courts have imposed a higher burden on summary judgment movants through local rules. *Professional Programs Group v. Department of Commerce*, 29 F.3d 1349, 1353 (9th Cir. 1994), the only case Novatel cites on this point, actually supports Dowty's position that it made a proper showing in its

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[10] In sharp contrast, in its summary judgment motion Dowty set forth in detail the specific elements Novatel had to establish to prevail on its fraud claim and then pointed out that there was no evidence in the record by which Novatel could attempt to prove those elements. (*See* Section II, *infra.)*

[11] Novatel also correctly concedes that two other cases it cites, *Baptiste v. Commissioner of Internal Revenue*, 29 F.3d 1533, 1536-37 (11th Cir. 1994) and *Lewis v. Gillette, Co.*, 22 F.3d 22, 23-24 (1st Cir. 1994), do not address a movant's required showing. (Pet. at 10-11.) These cases therefore do not support Novatel's argument. Neither court indicated that the fact that the movant in each case either referred to deemed admissions *(Baptiste)* or submitted affidavits *(Lewis)* supported an inference that it was required to do so.

summary judgment motion, and that Novatel failed to meet its burden in response. In its motion for summary judgment, Dowty included a "Statement of Undisputed Facts" along with its legal argument, just as the local rules discussed in *Professional Programs* required. *See Professional Programs*, 29 F.3d at 1353. [12]

In short, Novatel has failed to demonstrate that any circuit court applies a standard different than that applied by the Fourth Circuit in this case, or that district courts have adopted a more stringent standard through local rules. There is no reason for this Court to revisit its *Celotex* holding.

II. THIS CASE IS NOT APPROPRIATE FOR REVIEW BECAUSE RESPONDENT AMPLY SUPPORTED ITS MOTION FOR SUMMARY JUDGMENT.

This case also does not merit this Court's attention because factually it does not present the issues Novatel suggests. Far from making a "bald assertion," Dowty amply supported its summary judgment motion with an affidavit and legal argument.

In support of its summary judgment motion, Dowty submitted a thirty page memorandum along with an affidavit attaching deposition testimony of Novatel's President, exhibits from that deposition (including the parties' agreements, related

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[12] Novatel has mischaracterized *Professional Programs*. The local rule quoted in that case requiring submission of a Statement of Genuine Issues applies only to a party *opposing* a motion for summary judgment. *Id.* at 1353 & n.2 (quoting Local Rule 7.14.2 of the United States District Court for the Central District of California). Under the local rules for the Central District of California, a summary judgment movant need only submit a "Statement of Uncontroverted Facts and Conclusions of Law." *See* Local Rule 7.14.1 of the United States District Court for the Central District of California.

correspondence, and agreements between Novatel and certain of its customers). In addition, Dowty submitted a twenty-two page reply memorandum, together with a second affidavit attaching deposition testimony of Novatel's Executive Vice President, and an exhibit from that deposition. This evidence showed that Dowty had dealt with Novatel's product complaints in an open manner, but that Dowty's efforts to respond to Novatel's complaints were frustrated completely by Novatel's lack of responsiveness and refusal to return units for repair or replacement as the contract required.

In its opening brief, Dowty pointed out that, based on the terms of the parties' agreement, it was highly doubtful that Novatel could assert a fraud counterclaim under Maryland law. Dowty then set forth the elements of fraud and Novatel's burden of proof under Maryland law, and concluded that Dowty was entitled to summary judgment: after seven months of litigation and discovery that included production of over 100,000 documents and the taking of seventeen depositions, Novatel could not point to any evidence to establish the required elements.

Dowty also argued in its initial brief that under *Celotex*, "Novatel must come forward with specific evidence that shows that at the time any of the alleged representations were made, Dowty did not intend to produce equipment conforming to those representations." Dowty asserted that, despite extensive discovery, "not one piece of Dowty deposition testimony nor one single Dowty document supports Novatel's fraud claim." Thus, Dowty both discharged its burden of pointing out to the District Court the absence of evidence to support Novatel's case, and argued that under *Celotex*, Dowty's showing required Novatel to come forward with evidence to support its claim. *See Celotex*, 477 U.S. at 323-25.

Novatel admits that "[t]he burden on the nonmoving party in a summary judgment situation is well settled." (Pet. at 15.) Yet in opposing Dowty's motion for summary judgment, Novatel failed to produce any supporting evidence, and also failed to present any argument that it was not required to do so -- until *after* the District Court had rendered its decision.[13] For its opposition, Novatel submitted only a legal memorandum, with an attached document apparently generated by Novatel during the lawsuit, which Novatel neither authenticated nor explained. The memorandum itself devoted only one and one-half pages to Novatel's fraud counterclaim and failed to refer the District Court to any competent record evidence. No affidavits, and no sworn or certified papers, were submitted with the memorandum, as contemplated by Fed. R. Civ. P. 56(e).[14]

On this record, the District Court properly found that "Novatel [had] failed to submit, in accordance with Fed. R. Civ. P. 56, factual support for each element [of its fraud counterclaim]." *Dowty Communications, Inc. v. Novatel Computer Sys.*, 817 F.Supp. 581, 591 (D. Mass. 1992). As the District Court correctly noted, "'[t]here can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" *Id.* (quoting *Celotex*, 477 U.S. at 322-23.)

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[13] Indeed, in its motion to reconsider, Novatel made clear that this had been a conscious, tactical decision.

[14] As Novatel admits, the parties developed a "voluminous record" through discovery. (Pet. at 5.) Thus, as in *Celotex*, "no serious claim can be made that [Novatel] was in any sense 'railroaded' by a premature motion for summary judgment." *Celotex*, 477 U.S. at 326.

Because Dowty's showing was sufficient to require Novatel, as the party with the burden of proof, to demonstrate the existence of a genuine issue of material fact, the Fourth Circuit plainly did not err in affirming summary judgment for Dowty based on Novatel's failure to establish such a genuine issue of material fact.

III. BECAUSE THE FOURTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S EXERCISE OF DISCRETION IN ACCORD WITH WELL-SETTLED LAW, THERE IS NO NEED FOR THIS COURT TO REVIEW THE DECISION

A. The District Court Did Not Abuse Its Discretion in Granting Summary Judgment to Respondent Without an Oral Hearing

Novatel fails to note that it submitted *no* evidence to rebut Dowty's summary judgment motion. In the absence of any evidence from Novatel, there was no need for the District Court to hear oral argument.

Novatel also fails to cite any authority for its argument that the Fourth Circuit erred in affirming that the District Court did not abuse its discretion in deciding Dowty's motion without oral argument. Novatel's failure is not surprising considering that courts have consistently recognized that a district court may decide a motion for summary judgment on the basis of written submissions without an oral hearing. *See, e.g., Sakaria v. Trans World Airlines*, 8 F.3d 164, 169 (4th Cir. 1993) ("there is 'no absolute requirement that a ruling on a motion be preceded by a[n oral] hearing.'") (alteration in original) (citation omitted), *cert. denied* 114 S. Ct. 1835 (1994); *Lake at Las Vegas Investors v. Pacific Malibu Dev.*, 933 F.2d 724, 728-29 (9th Cir.

1991 (no prejudice in deciding summary judgment motion without oral hearing), *cert. denied*, 112 S. Ct. 1295 (1992); *Geear v. Boulder Community Hosp.*, 844 F.2d 764, 766 (10th Cir.) (same), *cert. denied*, 488 U.S. 927 (1988). There is no reason for this Court to consider this already well-settled issue.

B. The District Court Did Not Abuse Its Discretion in Denying Petitioner's Motion to Supplement the Record with an Untimely Affidavit

Novatel also fails to cite any authority for its argument that the Fourth Circuit improperly affirmed the District Court's denial of Novatel's motion to supplement the record with an untimely affidavit of Novatel's President. Novatel admits that it did not submit the affidavit until nine days after the District Court had granted Dowty's motion for summary judgment. (Pet. at 8.) Novatel further acknowledges that this Court in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 898 (1990), held that the trial court's refusal to receive untimely affidavits in that case was not an abuse of discretion. (Pet. at 18.) Novatel has provided no reason for this Court to review this issue.

Conclusion

For the above stated reasons, Dowty respectfully submits that this Court should deny Novatel's Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Eric A. Deutsch
Roger A. Lane
Thomas A. Bockhorst
TESTA, HURWITZ &
THIBEAULT
Exchange Place
53 State Street
Boston, MA 02109
(617) 248-7000

Thomas M. Goss
GOODELL, DEVRIES,
LEECH & GRAY
One South Street
Baltimore, MD 21202
(410) 783-4000

Counsel for Respondent Cray
Communications, Inc.

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